COA NO. 49992-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

COREAN OMARUS BARNES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Erik Rohrer, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's CrR 7.8 motion to vacate the burglary conviction. CP 16.

2. The evidence is insufficient to convict appellant of burglary.

3. The burglary conviction cannot stand because appellant is "actually innocent."

Issues Pertaining to Assignments of Error

1. Whether appellant's sufficiency of evidence claim can be reconsidered in the interests of justice and the burglary conviction vacated because the State failed to prove unlawful entry or presence?

2. Alternatively, if the sufficiency of evidence claim is considered procedurally barred, whether a gateway actual innocence claim requires vacature of the conviction?

B. STATEMENT OF THE CASE

1. First Trial

In the first trial, a jury convicted Corean Barnes of two counts of second degree rape and one count of unlawful imprisonment, but hung on the burglary charge. State v. Barnes, noted at 157 Wn. App. 1076, 2010 WL 3766574 at *1 (2010). The Court of Appeals reversed the convictions due to a Privacy Act violation. Id.

2. Second Trial

In the second trial, a jury convicted Barnes of two counts of second degree rape, one count of unlawful imprisonment, and one count of first degree burglary with sexual motivation. State v. Barnes, noted at 181 Wn. App. 1035, 2014 WL 2795968 at *1 (2014). The Court of Appeals decision summarized the evidence as follows:

> Corean Barnes and Christina Russell met in 2007 and dated between 2007 and 2008. They developed a sexual relationship. By August 2008, Russell decided that she did not want to have a further relationship with Barnes, but agreed to drive Barnes on various errands. On August 15, Russell purchased a digital tape recorder and placed it in her purse in order to surreptitiously record her conversations with Barnes.
>
> Later that day, Russell met Barnes at the house of Kenneth Johnson, who had rented a room to Barnes starting in July 2008. According to Russell, Barnes began making unwanted sexual contact with her. Russell testified that Barnes reached through her car window, touched her breasts, and put his hand down her pants. She told him to stop and said she did not want to do that. Barnes then pulled Russell out of the car by her wrists and forcibly carried her to his nearby camper. Russell testified that after a struggle, Barnes put his hand down her pants and penetrated her vagina with his finger. During this time, Russell was trying to break free and was telling Barnes that she did not want to do this. Barnes admitted touching Russell's breasts over her shirt but denied the remainder of Russell's testimony.
>
> Russell also described another incident later that day, after she picked up Barnes and drove him to Johnson's house. She and Barnes entered Johnson's house. Russell testified that they started kissing, but she decided she did not want to continue and attempted to pull away. Barnes then picked her up and carried her into a bedroom. As she

> attempted to get away, he closed.the door and pushed her into a corner. Russell testified that she continued to struggle, but Barnes forced her pants down. Although she kept telling him no, he had intercourse with her before she broke away. B arnes testified that Russell was a willing participant in the intercourse until she decided to stop after about two minutes, at which time Barnes stopped as well.
>
> Russell secretly recorded both incidents. She also recorded lengthy conversations with Barnes around the time of the incidents. Some of the statements involved Barnes's threats to harm Russell.
>
> On August 19, Johnson arrived home to find Barnes inside his house. Johnson objected to him being there without permission and called the police.[1]

Johnson's testimony is addressed in further detail given the issues in the present appeal. Johnson testified he was living at 121 Victoria View Lane in Sequim during the summer of 2008. RP[2] (9/19/12) 304. Barnes came to live with him in early July. RP 205. The arrangement was for Barnes to pay $300 in rent. RP 305. Barnes paid $200 for the month of July. RP 305-306. He was not able to make the rent for August. RP 306. According to Johnson, "he was going to move out and I told him he didn't have to, that we could -- that I could work with him and I knocked his rent down to $175" for the next month. RP 306, 309. Barnes was unable to come up with $175. RP 306. Johnson told Barnes near the beginning of August that he needed to leave. RP 312. Barnes ceased to live with

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[1] Barnes, 2014 WL 2795968 at *1-2.

[2] By commissioner ruling entered September 19, 2017, the report of proceedings from Court of Appeals No. 44075-0-II was transferred to the present appeal.

Johnson. RP 306-07, 310. Barnes did not move out entirely. RP 307. Johnson allowed Barnes to store some of his property at the house. RP 307. Johnson gave him a two-week grace period to move his things out, but this did not mean Barnes could come and go as he wanted. RP 315-16. Johnson told Barnes that he was not allowed to be there when Johnson was not there, but could come back to get his belongings. RP 307-08. RP 315-16. Barnes no longer slept there. RP 307. Johnson did not provide an access key to Barnes. RP 307. The door was always left unlocked. RP 314.

There was no written lease agreement. RP 309. Nothing was put in writing regarding Barnes not being welcome at the house; the two just had a conversation. RP 309. About a week after this conversation, Barnes was at the residence with some friends. RP 312. Barnes did not have permission to be in the home on August 15, 2008. RP 316. On August 19, Barnes was at the house packing up some of his things and doing laundry. RP 312-13. Johnson asked what the hell he was doing there. RP 317. Barnes did not act concerned. RP 317.

Due to instructional error, the Court of Appeals reversed the rape convictions but affirmed the remaining convictions. Barnes, 2014 WL 2795968 at *1. It rejected an argument that insufficient evidence supported the burglary charge, holding the State presented sufficient

evidence to conclude Barnes was not permitted to enter or remain on the property. Id. at *8-9.

3. Further Litigation

Following resentencing, Barnes appealed the sentence. State v. Barnes, noted at 195 Wn. App. 1008, 2016 WL 3965889 at *1, review denied, 186 Wn.2d 1030, 385 P.3d 108 (2016). Barnes also filed a CrR 7.8 motion challenging the sufficiency of evidence for the burglary conviction, which was transferred to the Court of Appeals as a personal restraint petition (PRP). Barnes, 2016 WL 3965889 at *2. The Court of Appeals rejected the appeal and the PRP. Id. at *1.

Barnes argued in part that the evidence was insufficient because he lawfully lived at the residence. Id. at *4. The Court of Appeals declined to review this argument because it had rejected the argument in a previous appeal and Barnes did not now show that the interests of justice required relitigation. Id. The Court of Appeals considered and rejected two "new reasons" why the evidence was insufficient: (1) previous reversal of the rape convictions precluded proof of first degree burglary and (2) "actual innocence," treated as a general sufficiency of evidence challenge. Id. at *4-5. Regarding the latter claim, the Court held a rational trier of fact could find that Barnes entered or remained unlawfully in the residence at

issue with the intent to rape another, and that he committed assault. Id. at *5.

4. The Present CrR 7.8 Motion

In December 2016, Barnes filed a pro se CrR 7.8 motion to vacate the burglary conviction on the theory that he was actually innocent of the offense. CP 83-141. Barnes argued he was actually innocent because he lawfully resided in the building at issue and therefore could not have unlawfully entered or remained there. CP 89-101. In support, Barnes pointed to court documents, dated after August 2008, showing his address to be the building at issue. CP 95-96, 105-12. Barnes further argued that Johnson did not have legal authority to refuse him permission to be there under landlord-tenant law. CP 99-100. Barnes distinguished his "actual innocence" claim from a sufficiency of evidence claim. CP 97-98, 100.

The State opposed the motion, arguing the matter had already been adjudicated by a competent court and could not be pursued further. CP 17-18. In the alternative, the State requested the motion be transferred to the Court of Appeals as a PRP. CP 18. A hearing was held on February 10, 2017, at which both sides reiterated their respective positions. 1RP[3] 11-29. The trial court denied the motion because the issue had already

[3] The verbatim report of proceedings is referenced as follows: 1RP - one volumes consisting of 2/10/17, 3/10/17, 3/24/17.

been litigated and resolved against Barnes in the prior Court of Appeals decision. 1RP 30; CP 16. Barnes appeals from the denial of his CrR 7.8 motion.[4] CP 15.

C. ARGUMENT

1. THE SUFFICIENCY OF EVIDENCE ISSUE SHOULD BE RELITIGATED IN THE INTERESTS OF JUSTICE BECAUSE BARNES SHOWS CONSTITUTIONAL ERROR AND THE PREVIOUS DECISION WAS CLEARLY ERRONEOUS.

Barnes advanced an "actual innocence" claim for why his burglary conviction should be vacated. But the trial court treated this claim as a sufficiency of evidence challenge and denied the motion on the basis that the sufficiency of evidence issue could not be relitigated. Barnes therefore first addresses whether a sufficiency of evidence claim is procedurally barred at this juncture. As set forth below, the interests of justice permit relitigation of the issue and, on the merits, Barnes shows there is insufficient evidence that he unlawfully entered or remained in the building. For this reason, the burglary conviction should be vacated.

a. This Court has the power to reexamine the issue in the interests of justice.

Whether a collateral attack is procedurally barred is a question of law reviewed de novo. State v. Carney, 178 Wn. App. 349, 356, 314 P.3d

[4] The court subsequently entered an order denying Barnes's motion for contempt. CP 5-6. Barnes did not appeal from this order.

736 (2013), review denied, 180 Wn.2d 1008, 331 P.3d 1172 (2014) (addressing one-year time limit). The trial court dismissed the CrR 7.8 motion because "the matter at issue has been considered and resolved per the Washington Court of Appeals – Div II decision (date 7/19/2016) in No. 47611-8-II." CP 16. To be precise, the sufficiency of evidence challenge at issue here was considered and resolved in the second appeal under No. 44075–0–II. Barnes, 2014 WL 2795968 at *8-9. In No. 47611-8-II, the Court of Appeals declined to review this argument again because it had rejected that argument in the previous appeal. Barnes, 2016 WL 3965889 at *4.

An appellate court generally will not reconsider issues that have been raised and resolved in a prior appeal. In re Pers. Restraint of Gentry, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999). But this procedural bar is not absolute. The Supreme Court has held "the mere fact that an issue was raised on appeal does not automatically bar review in a PRP. Rather, a court should dismiss a PRP only if the prior appeal was denied on the same ground and the ends of justice would not be served by reaching the merits of the subsequent PRP." In re Pers. Restraint of Taylor, 105 Wn.2d 683, 688, 717 P.2d 755 (1986); see also In re Pers. Restraint of Hews, 108 Wn.2d 579, 587-88, 741 P.2d 983 (1987) (applying "ends of justice"

standard to subsequent petition raising same ground, citing Sanders v. United States, 373 U.S. 1, 15, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963)).

Barnes asks this Court to reexamine the sufficiency of evidence issue in the interests of justice. There is precedent for such a request to be granted. In In re Pers. Restraint of Percer, 111 Wn. App. 843, 846, 47 P.3d 576 (2002), rev'd, 150 Wn.2d 41, 75 P.3d 488 (2003), the petitioner asked the Court of Appeals to consider a double jeopardy issue even though it had been rejected on direct appeal. Although there had been no intervening change in the law, the Court of Appeals reexamined the issue in the interests of justice because the court's earlier decision was incorrect and "the clear error involves a constitutional right." Id. at 847. The Supreme Court took review and upheld this part of the Court of Appeals decision, reasoning relitigation was appropriate because the earlier decision was clearly erroneous and the constitutional error worked a manifest injustice on the petitioner.[5] In re Pers. Restraint of Percer, 150 Wn.2d 41, 47-48, 75 P.3d 488 (2003).

The terminology and standard used in Percer is consistent with the law of the case doctrine, which "stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be

[5] The Supreme Court reversed the Court of Appeals on the merits of the issue, finding no double jeopardy violation. Percer, 150 Wn.2d at 44.

followed in subsequent stages of the same litigation." Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). RAP 2.5(c)(2) codifies certain restrictions on the doctrine: "The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review." The rule gives appellate courts discretion in its application. Roberson, 156 Wn.2d at 42. "[A]pplication of the doctrine may be avoided where the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party." Id.[6]

Barnes requests reexamination of the issue in the interests of justice. Although there has been no intervening change in the law, Barnes's sufficiency of evidence issue involves a constitutional right — the due process right to be convicted based on sufficient proof. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The prejudice in retaining the conviction is self-evident: a minimum of 44 months in confinement up to a maximum term of life, community custody and sex offender registration. CP 25-26, 32-33. As argued below, the

[6] The other exception is "where there has been an intervening change in controlling precedent between trial and appeal." Id.

previous Court of Appeals decision on the sufficiency of evidence issue was clearly erroneous.

b. The evidence is insufficient to convict for burglary because the State did not prove unlawful entry or presence.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. Winship, 397 U.S. at 364; State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The sufficiency of the evidence is a question of constitutional law reviewed de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

By statute, a person is guilty of first degree burglary "if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime . . . assaults any person." RCW 9A.52.020(1). The "to convict" instruction required the State to prove (1) Barnes "entered or remained unlawfully in a building" on August 15, 2008; (2) "that the

entering or remaining was with intent to commit a crime against a person or property therein; (3) "That in so entering or while in the building or in immediate flight from the building, the Defendant assaulted a person." CP 103.

The element of "entered or remained unlawfully in a building" is at issue here. A person unlawfully enters or remains in a building when he is not then "licensed, invited, or otherwise privileged to enter or remain." RCW 9A.52.010(3). The State was required to prove Barnes had no right to be in the residence. State v. Gregor, 11 Wn. App. 95, 99, 521 P.2d 960 (1974), review denied, 84 Wn.2d 1005 (1974) (citing State v. Rio, 38 Wn.2d 446, 230 P.2d 308 (1951)).

Johnson testified that Barnes did not have permission to be in the house without his approval and presence. RP 307-08, 316. In its earlier decision, the Court of Appeals relied on this testimony to find sufficient evidence for the unlawful entry element of the burglary offense. Barnes, 2014 WL 2795968 at *8-9. In the subsequent decision, the Court of Appeals declined to review the claim again. Barnes, 2016 WL 3965889 at *4. What the Court of Appeals overlooked is the impact of landlord-tenant law on this issue. Johnson's termination of Barnes's tenancy was without legal effect, such that Barnes still had the legal right to enter the premises regardless of whether Johnson permitted it. Barnes's entry and

presence was therefore lawful and insufficient evidence supported the burglary conviction.

In State v. Wilson, 136 Wn. App. 596, 603-04, 150 P.3d 144 (2007), the Court of Appeals addressed the issue of "whether entry or remaining in a jointly shared residence, *from which neither party has been lawfully excluded*, is unlawful for purposes of establishing this essential element of the crime of burglary." (emphasis added). The Court of Appeals upheld the dismissal of a burglary conviction because, although the acts Wilson committed inside the residence were unlawful, "his acts of entering and remaining inside were not themselves unlawful because the no-contact order did not exclude him from the residence he shared with [the protected party]." Id. at 604.

As in Wilson, Barnes was never "lawfully excluded" from the premises. Id. at 603. To determine whether a person's presence is unlawful, "courts must turn to whether the perpetrator maintained a licensed or privileged occupancy of the premises." Id. at 606. Barnes maintained a privileged occupancy of the premises. He was still in legal possession of the premises as a tenant because his tenancy rights were never legally extinguished. That Johnson orally rescinded his permission for Barnes to be there did not extinguish Barnes's tenancy rights.

To determine the legality of Barnes's entry and presence in the premises, we turn to the Residential Landlord Tenant Act, chapter 59.18 RCW, which sets forth the rights and obligations of tenants and landlords. "Landlord" means "the owner, lessor, or sublessor of the dwelling unit or the property of which it is a part, and in addition means any person designated as representative of the owner, lessor, or sublessor including, but not limited to, an agent, a resident manager, or a designated property manager." RCW 59.18.030(14). A "tenant" is "any person who is entitled to occupy a dwelling unit primarily for living or dwelling purposes under a rental agreement." RCW 59.18.030(27).

Barnes and Johnson entered into a rental agreement in which Barnes agreed to pay rent in exchange for living in the premises. RP 305-06. Barnes, by paying rent for the first month in exchange for residing in the premises, established a month-to-month tenancy. RCW 59.18.200(1)(a).[7] Crucially, such a tenancy "shall be terminated by written notice of twenty days or more, preceding the end of any of the months or periods of tenancy, given by either party to the other." RCW 59.18.200(1)(a). The tenancy was never terminated because no written

[7] "When premises are rented for an indefinite time, with monthly or other periodic rent reserved, such tenancy shall be construed to be a tenancy from month to month, or from period to period on which rent is payable[.]" RCW 59.18.200(1)(a).

notice was provided to Barnes. Johnson only gave oral notice. RP 309. Any purported termination was also ineffective because Johnson did not give Barnes 20 days notice. Johnson told Barnes on or about August 5 that he needed to leave. RP 310-11. The charged burglary offense at issue occurred on August 15, less than 20 days later. CP 103.

"RCW 59.18.200 requires that a landlord give a tenant at least 20 days notice before the end of a tenancy period in order to terminate a month-to-month tenancy without statutory cause to do so." Leda v. Whisnand, 150 Wn. App. 69, 77, 207 P.3d 468 (2009). Further, Johnson did not obtain a court order to exclude Barnes as a tenant. RCW 59.18.290(1) ("It shall be unlawful for the landlord to remove or exclude from the premises the tenant thereof except under a court order so authorizing."). And even if Johnson had gone to court, "[a] court has no power to give a landlord relief from a holdover tenancy unless the tenant was accorded proper notice." Id. at 85. No proper notice was given in Barnes's case.

As a matter of statutory law, Barnes's tenancy was still intact as of August 15, 2008. He still had the right to enter the premises. Any lack of permission from Johnson had no effect on Barnes's legal right to be there because the tenancy was never terminated in accordance with the law. As a result, the State failed to prove Barnes "entered or remained unlawfully

in a building," an element of burglary. Where insufficient evidence supports conviction, the charge must be dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). Barnes's burglary conviction must be reversed and the charge dismissed with prejudice because the State failed to prove each element of the charged offense.

2. ALTERNATIVELY, BARNES PRESENTS A GATEWAY ACTUAL INNOCENCE CLAIM TO OVERCOME THE PROCEDURAL HURDLE.

If this Court determines the sufficiency of evidence issue cannot be relitigated because it was previously raised and decided, then Barnes alternatively seeks review under a gateway actual innocence theory.

The Washington Supreme Court has only had occasion to address gateway actual innocence claims in cases involving otherwise time-barred collateral attacks, such that equitable tolling applies to reach the merits of the constitutional claim. In re Pers. Restraint of Weber, 175 Wn.2d 247, 249, 284 P.3d 734 (2012) (actually innocent of crime); In re Personal Restraint of Carter, 172 Wn.2d 917, 929, 263 P.3d 1241 (2011) (actually innocent of being a persistent offender). But an actual innocence claim is also available where a claim of constitutional error would otherwise be procedurally barred for some other reason. In Schlup v. Delo, 513 U.S. 298, 314-15, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995), for example, the procedural bar at issue for a second habeas petition was the failure to raise

the claim in the first habeas petition. The Washington Supreme Court has itself used broad language: "where a petitioner can meet the high burden of showing that he or she is actually innocent, procedural hurdles should not prevent review of constitutional claims." Weber, 175 Wn.2d at 256.

"[W]here the petitioner is alleging actual innocence to avoid a procedural bar that prevents judicial review of an alleged constitutional error, the petitioner's claim of actual innocence takes the form of a 'gateway' actual innocence claim." Carter, 172 Wn.2d at 924 (citing Schlup, 513 U.S. at 314). The Court of Appeals, in its previous decision, declined to consider Barnes's actual innocence argument because timeliness was not at issue. The Court treated the claim as a sufficiency of evidence argument. Barnes, 2016 WL 3965889 at *5. Properly understood, the gateway actual innocence claim is a means to overcome any procedural hurdle that would otherwise prevent a court from reaching the merits of a constitutional claim.

If Barnes is procedurally barred from relitigating the sufficiency of evidence claim at this juncture because it was previously considered by the Court of Appeals, then his gateway actual innocence claim should be addressed as a vehicle to overcome this procedural hurdle. The constitutional error here is a conviction based on insufficient evidence: "an essential of the due process guaranteed by the Fourteenth Amendment [is]

that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

A probability standard is used for those claiming to be convicted based on a constitutionally flawed trial. Weber, 175 Wn.2d at 259. Under the probability standard, after evaluating new reliable evidence in light of the evidence presented to the jury, a court must be persuaded that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Id. at 260 (quoting Schlup, 513 U.S. at 327). "New evidence in this context does not mean 'newly discovered' but rather 'newly presented' evidence." Id. at 258-59.

In his CrR 7.8 motion, Barnes included court documents dated after August 2008 listing his address as the same address that he was convicted of burgling. CP 95-96, 105-12. These documents are newly presented and there is no basis to question their reliability. Essentially, they are circumstantial evidence of Barnes's dominion and control over the premises. See State v. Partin, 88 Wn.2d 899, 906-08, 567 P.2d 1136 (1977) (government-issued documents and mail addressed to defendant were indicia of dominion and control over premises), disapproved on other

gorunds by State v. Lyons, 174 Wn.2d 354, 275 P.3d 314 (2012); State v. Vant, 145 Wn. App. 592, 599-600, 186 P.3d 1149 (2008) (keeping personal belongings and receiving mail at a residence supported finding that defendant resided there). They support Barnes's argument that the address was his lawful residence and, as such, he could not be convicted of burglary by unlawfully entering or remaining in it. The new documentary evidence, considered in conjunction with Barnes's right as a tenant to continued access to the premises, leads to the conclusion that no reasonable juror would have found Barnes guilty of burglary under the actual innocence standard.

D. CONCLUSION

For the reasons stated, Barnes requests vacature of the burglary conviction.

DATED this 28th day of September 2017

Respectfully Submitted,

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